IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY

DAVID KRAFSUR and FRANCIS LeVERT, Plaintiffs,	§	
	§	
v.	§	**EP-07-CA-401-DB**
	§	
SPIRA FOOTWEAR, INC., Defendant.	§	

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Defendant Spira Footwear, Inc.'s "Motion To Dismiss Amended Complaint For Indemnification Pursuant To Rule 12(b)(1)," filed in the above-captioned cause on January 4, 2008. On January 11, 2008, Plaintiffs David Krafsur and Francis LeVert filed their "Response In Opposition To Defendant's Motion To Dismiss Plaintiffs' Amended Complaint," to which Defendant filed a Reply on January 22, 2008. On January 29, 2008, the Court granted Plaintffs leave of court to file their Sur-Reply. After due consideration, the Court is of the opinion that Defendant's Motion should be denied for the reasons that follow.

BACKGROUND

The instant cause concerns a claim for indemnification.[1] Defendant Spira Footwear, Inc. ("Defendant" or "Spira") is incorporated in the State of Delaware and has its principal place of business in El Paso, Texas. Plaintiffs David Krafsur and Francis LeVert are private citizens who reside in the states of Colorado and Tennessee, respectively. Plaintiffs are former Spira directors and shareholders.

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[1] As the Court considers Defendant's Motion, it takes the factual allegations of Plaintiffs' complaint as true and resolves any ambiguities or doubts regarding the sufficiency of the claim in favor of Plaintiffs. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001).

Spira was incorporated on or about February 5, 2001. On or about June 4, 2004, Spira amended its corporate bylaws to include a paragraph on indemnification on behalf of its directors, officers, employees or agents sued on the basis of their employment status with Spira. On June 4, 2007, Spira filed a plea in intervention in a state court cause of action ("state action"), in which Plaintiffs were a party. Spira claimed that Plaintiffs conspired to breach their fiduciary duty as Spira board-members. On June 13, 2007, Plaintiffs' attorney tendered a written demand for indemnification for expenses incurred in association with defense of the state action. Spira refused Plaintiffs' demand. Plaintiffs filed the instant cause on November 19, 2007, claiming that diversity jurisdiction exists, pursuant to 28 U.S.C. § 1332. Plaintiffs seek indemnification, specific performance, declaratory relief, and attorneys fees.[2] The instant Motion followed.

DISCUSSION

Through the instant Motion, Defendant argues that Plaintiffs lack standing because Plaintiffs cannot satisfy the $75,000 amount-in-controversy requirement.[3] Specifically, Defendant avers that Plaintiffs cannot include attorneys fees, because no state statute exists authorizing said inclusion. Plaintiffs respond that the amount-in-controversy sought in the Amended Complaint is facially apparent. Next, Plaintiffs argue that they do not have the burden to prove subject matter jurisdiction, nor are they required to indicate which state statute they rely upon. In its Reply, Defendant retorts that Plaintiffs failed to establish their burden of proof. In their Sur-Reply, Plaintiffs indicate that Delaware case law, Delaware statute, and Spira bylaws permit recovery of attorneys fees. The Court finds Defendant's arguments unconvincing.

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[2] Plaintiffs seek attorneys fees for the underlying action in addition to the attorneys fees for prosecuting the instant case.

[3] The Parties do not contest that complete diversity of citizenship exists.

A. Burden of Proof Allocation

As an initial matter, the Court addresses Plaintiffs' argument concerning the burden of proof allocation. Plaintiffs argue that they do not bear that burden, because the instant cause was not removed from state court.[4] Specifically, Plaintiffs rely upon *St. Paul Reinsurance Co. v. Greenberg* in asserting that a party who originally files suit in a federal forum does not bear the burden of proving subject matter jurisdiction. 134 F.3d 1250, 1253 (5th Cir. 1998). The Court notes that Plaintiffs have misconstrued *St. Paul*'s holding, wherein the Fifth Circuit stated that, "[i]n removal practice . . . , the party invoking federal jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount." 134 F.3d at 1253. Unfortunately, Plaintiffs overlooked *St. Paul*'s express holding, indicating that "[t]he burden of establishing subject matter jurisdiction in federal court rests on the party seeking to invoke it."[5] *Id. See also Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002).

Here, Plaintiffs concede that they filed the instant case with the Court, thereby claiming the Court has subject matter jurisdiction. Regardless of this concession, Plaintiffs blind themselves to the simple truth of their argument: that, by seeking redress of their claims before the Court, they are invoking the Court's jurisdiction. Therefore, the Court is of the opinion that Plaintiffs bear the burden of proving that the Court may exercise subject matter jurisdiction over their claims.

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[4] *See, e.g., Manguno v. Prudential Property & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) ("The removing party bears the burden of showing that federal jurisdiction exists . . . .").

[5] In a removal action, the party seeking to invoke the Court's jurisdiction would be the removing party.

B. Amount-in-Controversy

The Court now turns to the dispositive issue: whether attorneys fees may be included to satisfy the jurisdictional requirement. In that regard, the Court notes that Plaintiffs' ability to recover attorneys fees is premised on the application of state law. Pursuant to the Rules of Decision Act, "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C.A. § 1652 (West 2006). In *Erie R.R. Co. v. Tompkins*, the Supreme Court of the United States held that, if the Constitution or Acts of Congress are silent on an issue presented to a court, then the court must look to a state's rule of decision, to include statutes and judicial decisions. 304 U.S. 64, 78 (1938). Therefore, a district court sitting in diversity must apply the substantive law of the state in which it sits. *See id.* Nevertheless, a rule regulating procedure is governed by federal law, such as the Federal Rules of Civil Procedure. *Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

Further, where a diversity case implicates choice of laws, to determine which state's substantive law controls, a court applies the choice of law rules of the forum state. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). While Defendants are silent on the issue, Plaintiffs contend that Delaware substantive law applies.[6] The Court, sitting in Texas, applies Texas' choice of law rules. *See Alberto v. Diversified Group, Inc.*, 55 F.3d 201, 203 (5th Cir. 1995). Thus, the Court applies Texas law in addressing Plaintiff's substantive claims but refers to federal law when addressing purely procedural matters.

First, the Court looks to federal procedural law to determine whether diversity jurisdiction exists. Title 28 U.S.C. § 1332(a) confers jurisdiction on district courts over civil actions between citizens of different states where the amount-in-controversy exceeds $75,000. For jurisdiction to exist under § 1332, diversity must be complete in that no plaintiff and no defendant may be citizens of the same state. *Wis. Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998). Generally, attorneys fees cannot be used to satisfy the amount-in-controversy requirement under § 1332, unless authorized by statute. *See Manguno*, 276 F.3d at 723 (citing *Foret v. State Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990)); *Graham v. Henegar*, 640 F.2d 732, 735 (5th Cir. 1981). Further, in examining the jurisdictional requirement, courts are directed to determine whether the amount-in-controversy is facially apparent. *Id.* If not, courts utilize "summary judgment-type evidence" to determine the amount in controversy at the time the complaint was filed. *Id.* ("The jurisdictional facts must be judged as of the time the complaint is filed.").

Here, Plaintiffs' Amended Complaint states, in conclusory terms, that the jurisdictional amount is satisfied as Plaintiffs are entitled to recover attorneys fees. Nevertheless, the Amended Complaint fails to indicate the expenses or attorneys fees actually incurred by Plaintiffs. Thus, the Court is of the opinion that the amount-in-controversy is not facially apparent from the face of the Plaintiffs' Amended Complaint. Therefore, the Court looks to summary judgment type evidence to determine whether Plaintiffs have established their burden of proving that the Court may exercise subject matter jurisdiction over the instant case.

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[6] Neither Party expressly declares a choice of law conflict applies; however, the Court recognizes that a conflict exists. Nonetheless, in its Sur-Reply, Plaintiffs argue that Delaware law permits recovery of attorneys fees, and conclude that said inclusion satisfies the $75,000 jurisdictional amount.

As noted above, state substantive law governs the inclusion of attorneys fees in satisfying the jurisdictional amount. As such, the Court looks to state law on this issue. Accordingly, Texas law states that "only the laws of the jurisdiction of incorporation of a foreign corporation shall govern (1) the internal affairs of the foreign corporation, including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares . . . ." TEX. BUS. CORP ACT ANN. art. 8.02 (Vernon 2003). In other words, Texas follows the "internal affairs doctrine," in which Texas courts apply the laws of the state of incorporation of a foreign corporation doing business in Texas. *Hollis v. Hill*, 232 F.3d 460, 465 (5th Cir. 2000).

Here, Spira was incorporated in the state of Delaware. Plaintiffs are former Spira directors seeking indemnification as outlined in Spira's corporate bylaws. Thus, the Court finds that, as the instant case concerns a corporation's bylaws and falls within the "internal affairs doctrine," the substantive laws of Delaware govern the instant case, pursuant to Texas choice of law rules.

As a result, the Court looks to the final decisions of the highest court of the state of Delaware to determine whether attorneys fees are recoverable. *See Hollis*, 232 F.3d at 465. In *Delle Donne & Associates, LLP. v. Millar Elevator Services, Co.*, the Delaware Supreme Court held that "[a]ttorneys' fees and expenses may be recovered under an indemnification agreement if they are incurred as a result of defending the claims that are the subject of the duty to indemnify." 840 A.2d 1244, 1256 (Del. 2004). Further, Delaware state statute expressly permits recovery of attorneys' fees. *See* DEL. CODE ANN. tit. 8, § 145(e).[7] Therefore, the Court finds that, because Plaintiffs have identified a Delaware statute permitting recovery of attorneys fees, said fees may be included to satisfy the amount-in-controversy jurisdictional requirement. Thus, the Court is of the opinion that Plaintiffs have satisfied their burden of proving that the Court may exercise diversity jurisdiction over the instant case, and that Defendant's Motion must be denied.

Accordingly, **IT IS HEREBY ORDERED** that Defendant Spira Footwear, Inc.'s "Motion To Dismiss Amended Complaint For Indemnification Pursuant To Rule 12(b)(1)" is **DENIED**.

SIGNED this **27th** day of **March, 2008**.

THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

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[7] The statute states in relevant part:

> (e) Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, . . . suit or proceeding may be paid by the corporation in advance of the final disposition of such action, . . . upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section.

DEL. CODE ANN. tit. 8, § 145(e).